Choongcons (Penang) Sdn Bhd v MS Elevators Engineering Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(C)(W)-1757–11 OF 2020
ABDUL KARIM, AHMAD ZAIDI IBRAHIM AND SEE MEE CHUN JJCA
10 JANUARY 2023

Contract — Building contract — Delay — Subcontractor's delay in completing and commissioning installation of lifts delayed completion of construction of condominium — Employer of project charged main contractor liquidated and ascertained damages ('LAD') for the delay — Whether main contractor could obtain indemnity for the LAD from the errant subcontractor

The appellant was employed by a company ('the Employer') to construct a high-rise condominium ('the main contract'). The appellant subcontracted work for the installation and commissioning of lifts in the project to the respondent ('the subcontract'). By the extended completion date of the project (17 August 2015), the main contract was still not completed (the Certificate of Practical Completion ('CPC') was only issued on 15 October 2015) which caused the Employer to impose liquidated and ascertained damages ('LAD') amounting to RM1,160,000 against the appellant for the delay. The appellant contended that the delay was caused by the respondent's failure to ready the lifts in time and sued the respondent for: (a) a declaration that under cl 3.3 of the subcontract, the respondent had to indemnify the appellant for the RM1.16m LAD; and (b) an order that the respondent forthwith pay the appellant the sum of RM279,387.20 together with interest (this was the balance LAD claimed from the respondent after the appellant had deducted RM880,617.72 from amounts certified as payable to the respondent under the subcontract). In its defence, the respondent claimed that any delay on its part was actually caused by the appellant's delay in handing over the lift shafts and motor rooms for the lift installation work to be done. The respondent claimed the lift shafts were only handed over on 17 April 2015. The respondent counterclaimed for RM955,269.85 as the sum owing for work done under the subcontract. The High Court dismissed the appellant's claim and allowed the counterclaim for a lesser amount. The court found that it was the appellant's delay in handing over the lift shafts and motor rooms to the respondent that delayed the latter from commencing the lift installation works; hence the appellant's claim was misconceived. In the instant appeal, the appellant argued that the High Court failed to consider contemporaneous documents in the form of site minutes, letters and emails where the respondent admitted to causing the delay and had never once raised the issue of late handing-over of lift

shafts and motor rooms. The appellant said the seven verticality/tolerance reports which the respondent itself had referred to at the trial proved that the lift shafts had already been handed over to the respondent by January 2015. The appellant said the respondent's delay in the delivery of lift equipment and accessories and the installation of governor ropes that did not comply with specifications were further reasons for the delay in issuance of the CPC and the imposition of the LAD.

Held, unanimously allowing the appeal and setting aside the High Court's decision:

(1) The High Court failed to give sufficient judicial appreciation to the contemporaneous documents which included the seven tolerance reports, minutes of site meetings and letters from the project's M&E engineer. The significance of the tolerance reports was that it showed that the lift shafts were already completed and handed over to the respondent. According to the project manager, PW2, the appellant commenced handing over the lift shafts since June 2014 and the respondent had carried out and completed verticality/tolerance checks of all the lift shafts by January 2015 (see paras 21 & 24).

(2) The sum effect of the tolerance reports and the evidence was that the High Court erred in finding that after January 2015 there was still a handing-over of lift shafts to the respondent. It begged the question as to how it was possible that after January 2015, there were still lift shafts being handed over when the respondent's own tolerance reports showed otherwise. The reports showed that the respondent had completed the tolerance checking by January 2015 which could only mean that the lift shafts were already handed over by then. This put paid to the respondent's contention that the appellant had only handed over the lift shafts on 17 April 2015 (see paras 27–28).

(3) In coming to its decision, the High Court relied on the respondent's three letters — dated 5 February 2015, 17 March 2015 and 16 April 2015 — thanking the appellant for the staggered handing over of the lift shafts. But these letters flew in the face of the verticality/tolerance reports submitted by the respondent itself. There was nothing in the High Court's grounds of judgment to explain why those three letters should be accepted when they contradicted the tolerance reports (see paras 22–23 & 29).

(4) At no time did the respondent raise any issue that the appellant had delayed in handing over the lift shafts and motor rooms. Not only was there no such delay on the appellant's part, there was, on the contrary, delay on the respondent's part in the delivery of lift equipment and accessories in breach of the timeframes stipulated under the subcontract (see paras 30 & 32–42).

(5) Viewed against the backdrop of the contemporaneous documents in the form of the tolerance reports, the site minutes, the revised work schedule put forth by the respondent, the letters of the M&E engineer and the CPC inspection report, it was clear that there was no delay on the appellant's part in handing over the lift shafts and motor rooms. Instead, it was the respondent's delay in the delivery of the lift equipment and accessories coupled with the issue of the governor ropes (that did not comply with specifications) that delayed the lift installation work and ultimately delayed the completion of the project. The CPC inspection report revealed that the main building work was substantially completed but not the lift installation work, which was the obligation of the respondent. The CPC report did not say anything about uncompleted work of any other subcontractor (see paras 52 & 61).

(6) As the respondent had caused the project to be delayed, the appellant was entitled to the declaration that it sought as well as the order that the respondent pay it the balance LAD sum of RM279,387.20 under the indemnity provision in cl 3.3 of the subcontract. Since the respondent was liable to indemnify the appellant, it followed that the respondent's counterclaim had to be dismissed (see paras 57, 59–60 & 66).

[Bahasa Malaysia summary

Perayu telah diambil bekerja oleh sebuah syarikat ('Majikan') untuk membina sebuah kondominium bertingkat tinggi ('kontrak utama'). Perayu subkontrak kerja untuk pemasangan dan pentauliahan lif dalam projek kepada responden ('subkontrak'). Menjelang tarikh penyiapan lanjutan projek (17 Ogos 2015), kontrak utama masih belum disiapkan (Sijil Penyiapan Praktikal ('SPP')) hanya dikeluarkan pada 15 Oktober 2015) yang menyebabkan Majikan mengenakan ganti rugi tertentu dan ditetapkan ('LAD') berjumlah RM1,160,000 terhadap perayu atas kelewatan tersebut. Perayu berhujah bahawa kelewatan tersebut disebabkan oleh kegagalan responden untuk menyediakan lif tepat pada masanya dan menyaman responden untuk: (a) deklarasi bahawa di bawah klausa 3.3 subkontrak, responden harus menanggung rugi perayu untuk RM1.16 juta LAD; dan (b) satu perintah supaya responden membayar segera kepada perayu sejumlah RM279,387.20 berserta faedah (ini adalah baki LAD yang dituntut daripada responden selepas perayu memotong RM880,617.72 daripada amaun yang diperakui sebagai kena dibayar kepada responden di bawah subkontrak) . Dalam pembelaannya, responden mendakwa bahawa sebarang kelewatan di pihaknya sebenarnya berpunca daripada kelewatan perayu menyerahkan aci lif dan bilik motor untuk kerja pemasangan lif dilakukan. Responden mendakwa aci lif hanya diserahkan pada 17 April 2015. Responden menuntut balas sebanyak RM955,269.85 sebagai jumlah terhutang untuk kerja yang dilakukan di bawah subkontrak. Mahkamah Tinggi menolak tuntutan perayu dan membenarkan tuntutan balas dengan jumlah yang lebih rendah. Mahkamah

mendapati bahawa ianya adalah kelewatan perayu dalam menyerahkan aci lif dan bilik motor kepada responden yang melambatkan perayu daripada memulakan kerja-kerja pemasangan lif; maka tuntutan perayu adalah salah arah. Dalam rayuan semasa, perayu berhujah bahawa Mahkamah Tinggi gagal mempertimbangkan dokumen kontemporari dalam bentuk minit tapak, surat dan emel di mana responden mengaku menyebabkan kelewatan dan tidak pernah membangkitkan isu lewat penyerahan aci lif dan bilik motor. Perayu berkata tujuh laporan verticality/tolerance yang responden sendiri telah rujuk pada perbicaraan membuktikan bahawa aci lif telah pun diserahkan kepada responden pada Januari 2015. Perayu berkata kelewatan responden dalam penghantaran peralatan dan aksesori lif dan pemasangan tali dawai yang tidak mematuhi spesifikasi adalah sebab lanjut kelewatan pengeluaran SPP dan pengenaan LAD.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Mahkamah Tinggi gagal memberikan penghargaan kehakiman yang mencukupi kepada dokumen kontemporari yang termasuk tujuh laporan tolerance, minit mesyuarat tapak dan surat daripada jurutera M&E projek. Kepentingan laporan *tolerance* adalah menunjukkan bahawa aci lif telah siap dan diserahkan kepada responden. Menurut pengurus projek, PW2, perayu mula menyerahkan aci lif sejak Jun 2014 dan responden telah menjalankan dan menyelesaikan semakan verticality/tolerance semua aci lif menjelang Januari 2015 (lihat perenggan 21 & 24).

(2) Jumlah kesan daripada laporan toleransi dan keterangan adalah Mahkamah Tinggi terkhilaf apabila mendapati bahawa selepas Januari 2015 masih terdapat penyerahan aci lif kepada responden. Ia menimbulkan persoalan bagaimana mungkin selepas Januari 2015, masih terdapat aci lif yang diserahkan apabila laporan *tolerance* responden sendiri menunjukkan sebaliknya. Laporan menunjukkan bahawa responden telah menyelesaikan semakan *tolerance* pada Januari 2015 yang hanya bermakna bahawa aci lif sudah diserahkan pada masa itu. Ini memberi kesan kepada dakwaan responden bahawa perayu hanya menyerahkan aci lif pada 17 April 2015 (lihat perenggan 27–28).

(3) Dalam membuat keputusannya, Mahkamah Tinggi bergantung kepada tiga surat responden — bertarikh 5 Februari 2015, 17 Mac 2015 dan 16 April 2015 — berterima kasih kepada perayu atas penyerahan aci lif secara berperingkat. Tetapi surat-surat ini tidak terpakai berbanding laporan verticality/tolerance yang dikemukakan oleh responden sendiri. Tiada apa-apa dalam alasan penghakiman Mahkamah Tinggi untuk menjelaskan mengapa ketiga-tiga surat itu harus diterima apabila ia bercanggah dengan laporan tolerance (lihat perenggan 22–23 & 29).

(4) Tidak pernah responden membangkitkan sebarang isu bahawa perayu telah melewatkan penyerahan aci lif dan bilik motor. Bukan sahaja tiada kelewatan di pihak perayu, sebaliknya, terdapat kelewatan di pihak responden dalam penghantaran peralatan lif dan aksesori yang melanggar tempoh masa yang ditetapkan di bawah subkontrak (lihat perenggan 30 & 32–42).

(5) Dilihat dari latar belakang dokumen semasa dalam bentuk laporan *tolerance*, minit tapak, jadual kerja yang disemak semula yang dikemukakan oleh responden, surat jurutera M&E dan laporan pemeriksaan SPP, ia adalah jelas bahawa terdapat tiada kelewatan di pihak perayu dalam menyerahkan aci lif dan bilik motor. Sebaliknya, kelewatan responden dalam penghantaran peralatan dan aksesori lif ditambah pula dengan isu tali dawai (yang tidak mematuhi spesifikasi) yang melambatkan kerja pemasangan lif dan akhirnya melambatkan penyiapan projek. Laporan pemeriksaan SPP menunjukkan bahawa kerja bangunan utama telah disiapkan dengan banyak tetapi bukan kerja pemasangan lif, yang merupakan kewajipan responden. Laporan SPP tidak menyatakan apa-apa tentang kerja yang belum disiapkan oleh mana-mana subkontraktor lain (lihat perenggan 52 & 61).

(6) Memandangkan responden telah menyebabkan projek tersebut ditangguhkan, perayu berhak mendapat deklarasi yang dimohon serta perintah supaya responden membayarnya baki LAD sejumlah RM279,387.20 di bawah peruntukan indemniti dalam klausa 3.3 subkontrak tersebut. Memandangkan responden bertanggungjawab untuk menanggung rugi perayu, justeru tuntutan balas responden harus ditolak (lihat perenggan 57, 59–60 & 66).]

Cases referred to

ABB Transmission and Distributions Sdn Bhd v Sri Antan Sdn Bhd & Anor [2009] 7 MLJ 644, HC (refd)

Malayan Banking Bhd v Basarudin bin Ahmad Khan [2007] 1 MLJ 613, FC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (folld)

Appeal from: Civil Suit No PA-22C-2–03 of 2019 (High Court, Pulau Pinang)

Lim Hock Siang (with Moy Jo Yin) (Presgrave & Mathews) for the appellant.
Regina a/p Daniel (Regina Daniel & Co) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant as the plaintiff had filed a claim against the respondent as the defendant premised on an indemnity in the sum of RM1.16m being liquidated and ascertained damages ('LAD') imposed by the employer of the project, following which the respondent was to pay the balance of LAD amounting to RM279,387.20.

[2] The respondent disputed the claim and counterclaimed for the balance payment of RM955,265.98 as due and owing.

[3] The High Court dismissed the appellant's claim and allowed the respondent's counterclaim. We allowed the appeal of the appellant and we now give our reasons.

PARTIES

[4] The appellant was appointed as the main contractor by Nuwata Sdn Bhd ('the employer') to construct a high rise condominium project 'Cadangan untuk Membina 2 Blok Kondominium 24 Tingkat (260 unit) di atas 4 Tingkat Podium Letak Kereta dan 1 Tingkat Kemudahan Masyarakat di atas Lot 7593 Mukim 13, Jalan Bukit Gambir Daerah Timur Laut, Pulau Pinang' ('the project'). The appellant and the employer entered into an agreement dated 26 March 2013 which adopted the PAM Contract 2006 ('the main contract').

[5] By letter of award dated 10 October 2013 ('the LA'), the appellant accepted the respondent as the nominated subcontractor ('subcontractor') for the supply, delivery, installation, testing, commissioning and maintenance of the lift installation of the project ('the subcontract work/lift installation work'). This was followed by a subcontract agreement dated 29 October 2013 based on the agreement and conditions of PAM subcontract 2016 ('subcontract COC').

BACKGROUND FACTS

[6] Pursuant to the main contract, the completion date was 31 January 2005 and the rate of LAD was RM20,000 per day. The mechanical and electrical engineer is GH Tag Consultancy ('M&E engineer') and the architect is Arkitek Permata ('architect').

[7] By the extended completion date of the project of 17 August 2015, the project had yet to be completed. A certificate of non-completion ('CnC')

under the main contract was issued by the architect of the project against the appellant. The certificate of practical completion ('CPC') to certify the main contract work had been practically completed was eventually issued on 15 October 2015.

[8] The appellant contends it was the respondent's default and delay which prevented it from achieving practical completion of the project which led the employer to impose LAD. The appellant's claim is as stated in para 43 of the amended statement of claim ('ASOC') as follows:

(a) a declaration that the appellant is entitled to an indemnity from the respondent in the sum of RM1,160,000 being LAD imposed by the employer due to the respondent's default under cl 3.3 of the subcontract; and

(b) an order the respondent pay to the appellant forthwith the sum of RM279,387.20 (being balance of LAD after RM880,612.72 which have been deducted) together with interest thereon from 23 April 2019 until date of full payment at the rate of 5%pa.

[9] The respondent's defence is essentially that the delay of the appellant in handing over the lift shafts and motor rooms for the lift installation work had caused the delay in the project. There was a counterclaim for the payment of work done under the subcontract COC of RM955,269.85, being progress claims of RM3.042m plus GST of RM36,504, minus RM2,123,234.15 being amount paid.

DECISION OF THE HIGH COURT (HC)

[10] The HC found for the respondent. In the main, due to the appellant's failure to deliver lift shafts to the site, the lift installation work was not completed on 17 August 2015 and this led to the appellant being unable to complete the project on that date. The appellant did not hand over all the lift shafts and the lift motor room to the respondent in January 2015. Ultimately as the appellant failed to hand over the aforesaid to enable the respondent to complete its lift installation work by 17 August 2015, the respondent is entitled to a few more months after the hand over to complete its work.

[11] With regard to the counterclaim, as the delay was attributed to the appellant and the respondent did in fact complete the lift installation work with the issuance of the CPC, the respondent was entitled to be paid for the work done, minus the GST. The counterclaim sum of a reduced amount of RM918,765,85 was allowed.

SUBMISSIONS OF THE APPELLANT

[12] The appellant contended that it was the respondent that caused the delay in the delivery of the lift equipment and accessories during the entire course of the project and this was compounded by its breach of specification in the governor's rope. This delay led to the CPC not being issued by the extended completion date and the LAD imposition by the employer. The HC had not considered contemporaneous documents in the form of site minutes, letters and emails where the respondent had admitted to delay and never once raised the issue of late hand over of lift shafts and motor room.

[13] It was further contended that the seven verticality/tolerance reports submitted by the respondent would show the hand over of lift shafts by January 2015. Further, all the revised schedules for the lift installation work were necessitated by the respondent's postponement in the delivery of lift equipment and accessories and none were based on installation work commencing from 17 April 2015. No issue on late hand over of lift shafts was ever raised.

SUBMISSIONS OF THE RESPONDENT

[14] The respondent in turn contended that it was the appellant who delayed the project when it was late in the hand over of the lift shafts and motor room. It had only received the lift shafts on 17 April 2015. By letters dated 5 February 2015, 17 March 2015 and 16 April 2015, the respondent had expressly acknowledged the receipt of the various lift shafts after January 2015.

[15] The appellant had obtained various extensions of time ('EOT') for the project, even before the respondent commenced its lift installation work.

The appellant's work programme too had been revised. In the light of these EOTs and the respondent's own revised work schedule, the respondent cannot be faulted for not complying with the work programme.

[16] In any event, any liquidated damages to be imposed is only up to 5% of the subcontract sum of RM3.042m, which is RM152,100.

OUR DECISION

[17] In the appellant's memorandum of appeal (encl 3/41–50), the appellant had raised numerous grounds of appeal. In its written submission dated 26 October 2021 (encl 18), these grounds of appeal have been reduced to the following issues:

(a) whether the learned HCJ erred in failing to hold that the delay in the subcontract work from 17 August 2015 to 15 October 2015 was due to the respondent's:

(i) delay in the delivery of the lift equipment and accessories; and

(ii) governor ropes installed found not to be in accordance to contractual specifications during JKKP inspection on 19 August 2015?

(b) whether the learned HCJ erred in holding that the respondent's delay in the completion of the subcontract works was caused by the late handing over of the lift shafts and motor room by the appellant?

(c) whether the learned HCJ erred in dismissing the appellant's claims for declaration that it is entitled to an indemnity of RM1.16m against the respondent and the balance sum of RM279,387.20? and

(d) whether the learned HCJ erred in allowing the respondent's counterclaim of RM918,765.85?

[18] We would surmise that the pivotal issue for determination is whether there had been a delay in the hand over of the lift shafts and motor rooms by the appellant, or in the delivery of lift equipment and lift accessories by the respondent, which lead to the delay in the lift installation work and which in turn led to the delay in the project.

THE ISSUE OF DELAY

[19] We shall first look at what the HC had to say on this. The HC in its paras 27–28 of the grounds of judgment (GOJ, encl 21/1232) stated that the respondent had failed to complete the subcontract work by the EOT date of 17 August 2015. This was next said:

> [29] Disebabkan defendan gagal untuk menghantar peralatan lif ke tapak telah menyebabkan kerja-kerja sub-kontrak pada 17 Ogos 2015 tidak dapat diselesaikan. Jadi, plaintif juga gagal menyelesaikan projek tersebut pada 17 Ogos 2015.
>
> [30] Atas sebab-sebab kelewatan defendan untuk menyiapkan kerja-kerja sub-kontrak itu, pihak arkitek telah mengeluarkan sijil perakuan tidak siap dibawah kontrak utama terhadap plaintif pada 17 Ogos 2015.
>
> [31] Hanya pada 15 Oktober 2015, pihak arkitek mengeluarkan sijil siap praktikal setelah kerja-kerja sub-kontrak diselesaikan oleh defendan.

[20] The HC nevertheless attributed such delay to the appellant as follows:

> [34] Adalah tidak dipertikaikan bahawa sehingga bulan Januari 2015, pihak plaintif tidak memberikan lif shaf dan bilik motor yang sempurna (*complete*) kepada defendan.

[35] Pihak plaintif menyatakan yang mereka telah serahkan lif shaf pada bulan Januari 2015 kepada defendan. Walau bagaimanapun, berdasarkan keterangan-keterangan, lif shaf telah diserahkan sebahagiannya kepada defendan pada bulan Januari 2015.

[36] Selepas bulan Januari 2015, pihak defendan masih lagi menerima lif shafdi tapak Projek tersebut. Ini telah dibuktikan oleh defendan melalui surat-surat mereka bertarikh 5 February 2015, 17 March 2015 dan 16 April 2015 (sila lihat ms 53, Ikatan Dokumen B, ms 358–360 Ikatan Dokumen C).

...

[42] Pihak plaintif telah gagal untuk menyediakan lif shaf dan bilik motor kepada defendan untuk memulakan kerja-kerja pemasangan lif-lif seperti yang dipersetujui dalam subkontrak. Atas kegagalan Plaintif untuk menyediakan lif shaf dan bilik motor bermakna yang plaintif telah gagal untuk memberi pemilikan tapak untuk defendan memulakan kerja-kerja subkontrak oleh defendan.

...

[44] Di sini pihak plaintif telah gagal melaksanakan bahagian di dalam kontrak yang perlu dilaksanakan iaitu menyediakan lif shaf dan bilik motor bagi defendan melaksanakan bahagian kontrak beliau iaitu bahagian pemasangan lif plaintif gagal menyediakan lif shaf dan bilik motor mengikut kontrak dimana kelewatan plaintif menyediakan lif shaf dan bilik motor telah mengakibatkan kelewatan kepada defendan untuk membuat pemasangan lif.

[45] Pihak plaintif telah gagal melaksanakan bahagian mereka dalam kontrak pada masa material dan dalam keaddan ini, plaintif tidak boieh menyalahkan defendan atas kegagalan mereka menyediakan lif shaf, bilik motor dalam masa yang ditetapkan di dalam kontrak dan ini merupakan pelanggaran yang fundamental kepada kontrak.

...

[48] Adalah jelas dari keseluruhan keterangan yang plaintif telah lewat di dalam menyediakan lif shaf dan bilik motor kepada defendan yang mana ianya bermaksud bahawa plaintif tidak memberi akses kepada tapak projek tersebut untuk defendan melaksanakan kerja-kerja sub-kontrak. Plaintif adalah terikat untuk melaksanakannya mengikut kontrak. Plaintif adalah penyebab kepada kelewatan dia dalam projek tersebut.

Handover of lift shafts and motor rooms

[21] In attributing delay to the appellant, the HC had relied on the letters dated 5 February 2015, 17 March 2015 and 16 April 2015 from the respondent to the appellant that after January 2015, the respondent was still receiving lift shafts from the appellant. In this regard, we are of the considered opinion that the HC had not given sufficient judicial appreciation to the contemporaneous documents which include the tolerance reports, minutes of site meetings and letters from the M&E.

[22] The respondent's letters dated 5 February 2015, 17 March 2015 and 16 April 2015 can be found in encl 21/309–311 respectively. They are set out as follows:

(a) letter of 5 February 2015:

> Handover of Lift Shaft L1, L2 and L3 (Block A)
>
> Refer to the above, we wish to thank your good office for handling over the lift shaft L1, L2 and L3 for us to commence our Lift Installation work on 29 January 2015.
>
> We require fourteen (14) weeks for installation works & ten (10) weeks for testing & commissioning work.

(b) letter of 17 March 2015:

> Handedover of Lift Shaf (Lift B1, B2 & B3)
>
> Refer to the above, we wish to thank your good office for handed over the lift shaft to us on 9th March 2015 for us to commence our lift installation work.

(c) letter of 16 April 2015:

> Handedover of Lift Shaft (Lift A4)
>
> Refer to the above, we wish to thank your good office for handed over the lift shaft to us on 1st April 2015 for us to commence our lift installation work.

[23] However, these letters fly in the face of the verticality/tolerance reports submitted by the respondent themselves. Clause 2.16 of the LA (encl 21/84) requires of the respondent:

> You are required to assist us in the taking and confirmation on the lift shaft vertically at every 3 floors of which and report shall be submitted to us everytime an inspection is made.

[24] It is undisputed the allowable tolerance for the lift shafts is +/- 50mm. According to PW2 (Yong Chong Kiat, Project Manager), the appellant commenced handing over the lift shafts since June 2014 and the respondent had carried out and completed verticality checks of all lift shafts by January 2015. Refer to Q&A 38, encl 21/265–267. The significance of these reports is that the lift shafts must be handed over before any tolerance checking can be done.

[25] There was a total of seven tolerance reports as below:

(a) the respondent's letter dated 27 June 2014 and the tolerance checking report for A1-A3 (level 1–11) and B1-B3 (level 1–8); encl 21/268–273;

(b) the respondent's letter dated 26 September 2014 and the tolerance checking report for A1-A4 (level 17–20); encl 21/274–277;

(c) the respondent's letter dated 31 October 2014 and the tolerance checking report for A1–A3 (level 2–22) and B1–B3 (level 219); encl 21/278–285;

(d) the respondent's letter dated 19 November 2014 wherein the respondent states that 'we wish to inform that tolerance check for the lift shaft Block A and Block B has successfully carried out on 13th November 2014' and the tolerance checking report for A-A4 (level 10–28) and B1-B4 (level 6–22) was annexed therein; encl 21/286–295;

(e) the respondent's letter dated 3 December 2014 and the tolerance checking report for A-A4 (level 10-26) and B1-B4 (level 6-22); encl 21/296–299;

(f) the respondent's letter dated 23 December 2014 and the tolerance checking report for B1–B4 (level 22–25); encl 21/300–302; and

(g) the respondent's letter dated 28 January 2015 stating that 'tolerance checking for the lift shaft Block B has successful carried out on 19 January 2015', that the respondent's 'acceptance tolerance is +/- 50 mm' and annexed the tolerance checking report for B1-B4 (level 25–28); encl 21/303–306.

[26] In fact, DWTs (Ooi Seng Yong, Assistant Manager) evidence in cross-examination as per encl 21/343 was as follows:

> LHS: So is it correct that in order for you to carry out the lift shaft checking, the plaintiff must have completed the lift shaft already?
>
> OSY: Yes.

[27] The sum effect of the tolerance reports and the evidence meant that before the respondent could have carried out the tolerance tests, the lift shafts had to be handed over to it.

[28] We thus find that the HC's finding that after January 2015 there was still a hand over of lift shafts to the respondent was an error, as the tolerance reports had not been considered. It begs the question as to how is it possible that after January 2015, there was still lift shafts being handed over when the respondent's own tolerance reports showed otherwise. The reports showed the respondent had completed tolerance checking by January 2015 which could only mean the lift shafts were handed over by then. This puts paid to the respondent's contention the appellant had only handed over on 17 April 2015.

[29] There was nothing in the GOJ to explain why the respondent's letters dated 5 February 2015, 17 March 2015 and 16 April 2015 should be accepted

when such letters contradicted the tolerance reports referred to above.

[30] If indeed the appellant was the cause of delay, there were no issues raised by the respondent at any time on this matter, more so when the appellant and the M&E engineer was raising the slow progress of the lift installation work. In this regard, the site meeting minutes and the various documents are as referred to in the subsequent paragraphs. DW1 gave evidence the respondent was told not to put anything in writing. This cannot be accepted when the respondent knew that delay may result in the imposition of LAD.

[31] The contention of partial site possession similarly falls when the lift shafts and motor rooms had been handed over in January 2015.

DELIVERY OF LIFT EQUIPMENT AND ACCESSORIES

[32] Not only was there no late hand over of the lift shafts and motor rooms by the appellant, we further find that it was the respondent that delayed in the delivery of lift equipment and accessories.

[33] The subcontract COC requires the respondent to deliver all lift equipment and accessories to the site within 24 weeks from the date of payment of the down payment of RM304,200. The M&E engineer had certified the down payment as in encl 21/329 and payment was duly made on 19 May 2014 and this is not disputed. This would mean that the respondent is contractually obliged to deliver all lift equipment and accessories by 3 November 2014. This was not done and in subsequent revised dates too.

[34] We now refer to the respondent's own revised work programme that the respondent had rescheduled the delivery to 'by 15 November 2014' and to complete work by 13 May 2015 (encl 21/132–134).

[35] The next set of documents was the minutes of site meeting no 35 held on 9 January 2015 where the delivery was rescheduled to 'by 21 January 2015' (item 6.1.2, encl 21/137) and site meeting no 37 held on 6 February 2015 where delivery was again rescheduled to June 2015. This was recorded as item 6.1.1 in encl 21/143 as follows:

> ... the final delivery of lift equipment can only be done in June 2015 and will affect the completion date ...

[36] The next site meeting No 41 dated 17 April 2015 recorded that the delivery of call button would be by 22 April 2015 and that all lifts with JKKP clearance would be delivered by 23 June 2015. It was also recorded that Tower A service lift would be delivered by 15 May 2015 and for Tower B it would be

1 June 2015. Refer to encl 21/156. Such was not done.

[37] At site meeting no 45 held on 7 August 2015, it was recorded that the respondent would complete the delivery and installation of Wide Jamb for lifts A4 and B4 and lift CP Panel on 10 August 2015 and 30 August 2015 respectively (encl 21/185).

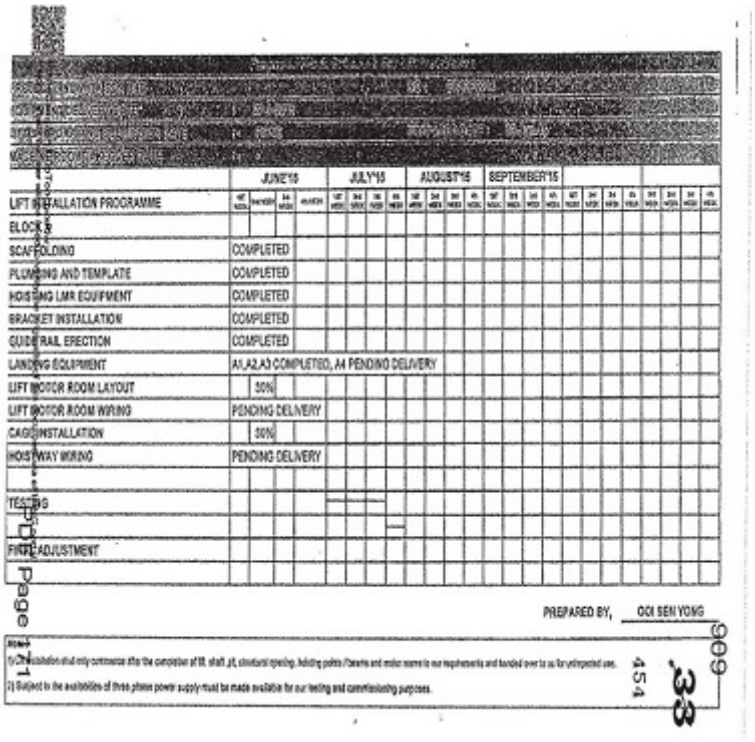
[38] We turn next to letters from the M&E engineer to the respondent. These are dated 6 February 2015 (encl 21/144), 12 February 2015 (encl 21/145), 10 March 2015 (encl 21/150) and 10 April 2015 (encl 21/151). All were captioned 'late delivery of lift equipment'. We refer, for instance, to the letter of 10 March 2015 as follows:

> Late Delivery of Lift Equipment & Accessories-Reminder 2
>
> We refer to the meeting/letter dated 12th February 2015 and our previous letter dated 6th February 2015, we would like to express our grave concern on the delay of equipment delivery by 6th March 2015 which are greatly affect the site progress.
>
> We therefore required you to pay serious attention to delivery all outstanding equipment (inclusive door frame, control panel, door sill, jamb, etc.) immediately as a matter of urgency that is affecting the main builder's progress of work and to complete in time.
>
> We wish to inform you that the delay may incur LAD to you.

[39] This letter and the letter dated 12 February 2015 were not disputed by DW1 as per encl 21/335:

> LHS: Can you look at the next letter of 12.2.2015 at page 473. Did you receive this letter from the Engineer?
>
> OSY: Yes.
>
> LHS: Do you agree with the contents of this letter? OSY: Yes.
>
> LHS: Can I refer you to page 474. Do you receive this letter from the Engineer on 10.3.2015?
>
> OSY: Yes.
>
> LHS: Do you agree with the contents of this letter?
>
> OSY: Yes.

[40] Ultimately the respondent put forth a revised schedule dated 19 June 2015 (encl 21/171) to the M&E engineer:



LIFT INSTALLATION PROGRAMME	JUNE'15	JULY'15	AUGUST'15	SEPTEMBER'15
BLOCK B				
SCAFFOLDING	COMPLETED			
PLUMBING AND TEMPLATE	COMPLETED			
HOISTING LMR EQUIPMENT	COMPLETED			
BRACKET INSTALLATION	COMPLETED			
GUIDE RAIL ERECTION	COMPLETED			
LANDING EQUIPMENT	A1,A2,A3 COMPLETED, A4 PENDING DELIVERY			
LIFT MOTOR ROOM LAYOUT	30%			
LIFT MOTOR ROOM WIRING	PENDING DELIVERY			
CAGE INSTALLATION	30%			
HOISTWAY WIRING	PENDING DELIVERY			
TESTING				
FINAL ADJUSTMENT				

PREPARED BY, OOI SEN YONG

1) Installation shall only commence after the completion of lift, shaft, pit, structural opening, hoisting points /beams and motor room to our requirements and handed over to us for unimpeded use.
2) Subject to the availabilities of three phase power supply must be made available for our testing and commissioning purposes.

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33

[41] The revised schedule would show that:

(a) 'The lift motor room wiring' and 'hoist way wiring' were still 'pending delivery' with no indication when these wiring would be delivered;

(b) 'The landing equipment' for A4 was still 'pending delivery', again with no indication when the same would be delivered;

(c) 'Lift motor room layout' was 30% completed;

(d) 'Cage installation' was 30% completed;

(e) 'Testing' would be carried out on the first three weeks of July 2015; and

(f) 'Final Adjustment' would be carried out on the fourth week of July 2015.

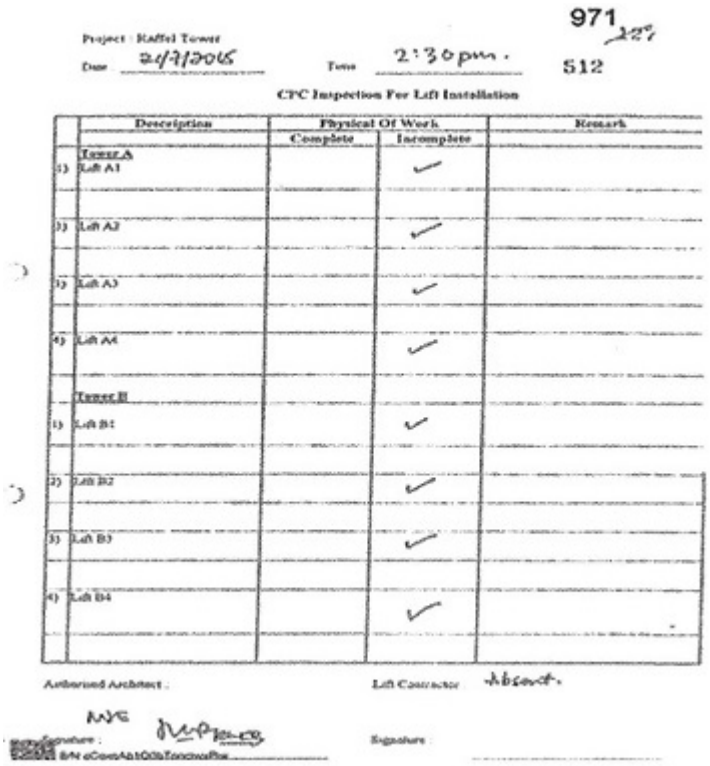
[42] DW1 confirmed the lift installation work was not completed by 23 June 2015 (encl 21/339 line 18).

CPC INSPECTION, CHECKLIST REPORT AND THEREAFTER

[43] The next significant event is the CPC inspection on 31 July 2015. Prior to that, there was a second EOT of the project to 31 July 2015 granted by the

architect. The checklist report signed by the architect can be found in encl 21/174–178. It showed the main building work had been essentially completed where there was a handwritten note that 'contractor to rectify defects as highlighted 31/7 for completed items'.

[44] Page 179 relates to the inspection for lift installation and it records as follows:



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Project : Raffel Tower

Date 24/7/2015 Time 2:30pm. 512

CPC Inspection For Lift Installation

	Description	Physical Of Work		Remark
		Complete	Incomplete	
	Tower A			
1)	Lift A1		✓	
2)	Lift A2		✓	
3)	Lift A3		✓	
4)	Lift A4		✓	
	Tower B			
1)	Lift B1		✓	
2)	Lift B2		✓	
3)	Lift B3		✓	
4)	Lift B4		✓	

Authorised Architect : Lift Contractor : Absent.

Signature : Signature :

[45] All the eight lifts in both blocks were not completed wherein the respondent did not attend the inspection.

[46] The third EOT was granted to 17 August 2015.

[47] At site meeting no 49 held on 7 August 2015 (encl 21/185) it was reported as follows:

6.0 Mechanical & Electrical Matters

6.1 Delivery of Lift Equipments

6.1.1 MSEE reported that they have written in JKKP and the dates for JKKP inspection has been confirmed:

Lift	Inspection Date
A1, A2, A3&B1	19/08/2015
B2, B3, B4&A4	03/09/2015
JKKP CCC Clearance letter	10/09/2015

[48] MSEE refers to the respondent, The respondent had in fact obtained the JKKP inspection date of 19 August 2015. But, before the JKKP inspection could take place, came the letter dated 18 August 2015 from the M&E engineer to the respondent (encl 21/188) as follows:

Lift Outstanding and Incomplete Works until 18/8/215

We refer to the above project and numerous of verbal, written and meetings reminders pertaining the delay and incomplete installation, we are regret to observe that the lifts are not fully complete and still in progress of installation despite the JKKP inspection is schedule on 19.8.2015.

In our opinion, the lifts are practically not completed on 18 Aug 2015 based on follows:

a) Only Lift A1, A2, A3 and B1 are reported ready for JKKP inspection

b) The other 4 nos of lifts, A4, B2, B3 & B4 are still not completed installation (wire ropes, cars cage, accessories, low & high speed test, etc) and not ready for JKKP inspection).

[49] DW1 agreed that based on the above letter, the respondent failed to complete the lift installation work whereby the JKKP inspection could not proceed. Refer to encl 21/340. This would be in reference to para 2b but lifts A1, A2, A3 and B1 were ready for inspection.

GOVERNOR ROPES

[50] It then turned out the governor ropes installed by the respondent were not in accordance with the specifications. This was confirmed by DW1 as follows (encl 21/341):

LHS: Can you refer to page 54 7, can I draw your attention to item 6.1.2 at page 54 7, do you agree that you informed the meeting that JKKP inspection failed due to deviation of governor rope sizes which is 10mm in contract and installed 6mm on site?

OSY: Yes.

LHS: Then you informed the meeting that you will be obtaining a clearance letter for the approval of 6mm governor rope installed on site by 25th August 2015?

OSY: Yes.

LHS: Do you also agree with me that in this meeting you have informed all the parties that you will be arranging another JKKP inspection and the dates were as stated there?

OSY: Yes.

CPC ISSUED

[51] This led to the architect issuing CnC dated 17 August 2015 for the project. The respondent obtained JKKP clearance on 15 October 2015 as recorded in item 6.1.1 of site meeting no 54 held on 16 October 2015 (encl 21/254). The CPC for the project was issued dated 15 October 2015.

CONCLUSION ON THE ISSUE OF DELAY

[52] Viewed against the backdrop of the contemporaneous documents in the form of the tolerance reports, the site minutes, the revised work schedule, the letters of the M&E engineer and the CPC Inspection Report which have been detailed out above, it is clear to us that there was no delay by the appellant in the hand over of the lift shafts and motor rooms. On the contrary, it was the respondent who had delayed in the delivery of the lift equipment and accessories coupled with the issue of the governor ropes. This was what caused the delay to the lift installation work and ultimately to the project. The respondent had been in breach of the subcontract COC, the provisions of which are referred to below. It bears emphasizing that from the CPC inspection report, the main building work had been substantially completed but not the lift installation work, which was the obligation of the respondent.

[53] The respondent contended there had been EOTs granted for the project even before the respondent commenced work. This however does not detract the respondent from performing its obligations under the subcontract COC. We refer in particular to cll 2.1, 3.1 and 3.2:

Completion of Sub-Contract Works in accordance with Sub-Contract Documents	2.1. The Sub-Contractor shall upon and subject to the Sub-Contract Conditions carry out and complete the Sub-Contract Works in accordance with the Sub-Contract Documents and in compliance therewith provide designs (if any), materials, goods and workmanship of the quality and standard described in the Sub-Contract Documents and/or required by the Contractor and Architect or Consultant in accordance with the provisions of the Sub-Contract.

...

Sub-Contractor's compliance with the main contract	3.1	The Sub-Contractor shall observe, perform and comply with all the provisions of the main contract on the part of the Contractor to be observed, performed and complied with, so far as they relate and apply to the Sub-Contract Works.
Sub-Contractor to discharge obligation	3.2	The Sub-Contractor shall execute and complete the Sub-Contract Works so as to enable the Contractor to discharge his obligation under the main contract.

[54] The reference to *ABB Transmission and Distributions Sdn Bhd v Sri Antan Sdn Bhd & Anor* [2009] 7 ML J 644 on delay, disruption and prevention does not assist the respondent. It had referred to the following at pp 660–661:

> [49] It is my finding that the first defendant breached the subcontract when it delayed and disrupted materially the plaintiffs performance of the subcontract causing the plaintiff to suffer various losses and expenses.
>
> [50] In the performance of the subcontract the first defendant is under a duty to cooperate and a duty of non-prevention. These duties require the first defendant to cooperate with the plaintiff to enable the plaintiff to carry out its work in a regular and orderly manner and for the first defendant not to impede the plaintiff form carrying out its obligations in a regular and orderly manner *In Luxor (Eastbound) Ltd v Cooper* (1941) AC 108, Lord Simon stated that:
>
> > Generally speaking where B is employed by A to do a piece of work which requires A's cooperation it is implied that the necessary cooperation will be forthcoming.
>
> [51] In *Barque Quilpu Ltd v Brown* [1904] 2 KB 264, Vaughan Williams LJ stated that:
>
> There is an implied contract by each party that he will not do anything to prevent the other party from performing a contract or to delay him in performing it. I agree that generally such a term is by law imported into every contract.

[55] In our instant case, there has been no act of delay, disruption or prevention by the appellant, but rather by the respondent.

THE ISSUE OF INDEMNITY

[56] As noted at the outset, the appellants claim is premised on an indemnity in the sum of RM1.16m being liquidated and ascertained damages ('LAD') imposed by the employer, following which the respondent was to pay the balance of LAD amounting to RM279,387.20.

[57] The indemnity provision is contained in cl 3.3 of the subcontract COC:

Sub-Contractor to indemnify the Contractor	3.3	The Sub-Contractor shall indemnify and save harmless the Contractor against and from: 3.3(a) any breach, non-observance or nonperformance by the Sub-Contractor, his servants, agents or subcontractors of any of the provision of the main contracts; and 3.3(b) any act or omission of the Sub-Contractor, his servants, agents or sub-contractors which involves the Contractor in any liability to the employer under the provisions of the main contract.

[58] Pursuant to the main contract, the rate of LAD is RM20,000 per day. The respondent's witnesses were aware that the employer had imposed LAD (encl 21/348). As a matter of fact, the M&E engineer had warned by letter, as early as 6 February 2015, 'that the delay may incur LAD to you' (encl 21/144).

[59] It follows from our finding that as the respondent is the cause of the delay to the project that the indemnity provision can be invoked against it, such that the declaration sought, is allowed.

[60] It is not disputed that the appellant had deducted RM880,617.72 from amounts certified to the respondent under the M&E Engineer's Certificates of Payment 3, 4(R), 5 and 6. The respondent is thus liable to the appellant for a balance sum of RM279,387.20 (RM1.16m–RM880,617.72).

[61] We do not agree with the respondent's contention that the appellant had failed to prove that the respondent was the sole cause of delay where there were many other subcontractors involved. It bears repeating that from the CPC inspection report, the lift installation work, which was the obligation of the respondent was not completed. Nothing was mentioned about the uncompleted work of any other subcontractor.

[62] We are also not inclined towards the contention that the appellant is only entitled to claim liquidated damages on a maximum limit of 5% of the subcontract sum of RM3.042m. This is because the appellant's claim is premised on the indemnity provision of cl 3.3 of the subcontract COC for an act or omission of the respondent which involves the appellant in a liability towards the employer under the main contract. It is not a claim for liquidated damages.

[63] The right to sue for damages for breach of contract is a distinct cause of

action to that of a right to sue for indemnity. This has been recognised by the Federal Court in *Malayan Banking Bhd v Basarudin bin Ahmad Khan* [2007] 1 MLJ 613. At p 616 read with p 625, the first question of law was answered in the positive. That question was:

> In a contract that contains a promise by a party (the promisor) to indemnify the other party (the promisee) for loss if there is a breach of the contract by the promisor, whether the promisee has a right to sue the promisor either for breach of contract or on the indemnity, if there is breach of the contract by the promisor.

[64] At p 619, the court stated:

> [9] We will now consider the first question posed to us in this appeal. The issue as put by the appellant is whether the appellant in this case is only confined to suing on indemnity because the agreement contains an indemnity clause, or does the appellant have a choice to sue for either breach of contract or, on the indemnity. The learned counsel for the appellant submitted that it has such a choice. It is also the appellant's contention that at common law, the right of a contracting party to claim damages for breach of contract may only be excluded by express or implied terms of the contract.
>
> [10] It is settled law that a contract may give rise to several distinct causes of action (see *Telfar Shipping Corporation v Inersea Carriers SA* [1983] 2 Lloyd's Rep 351), The right to sue for damages for breach of contract is a distinct cause of action to that of right to sue for indemnity provided that the agreement or arrangement entered into is one of a contractual relationship as ordinarily understood in law and not a contract of indemnity simpliciter. It is therefore a matter of construction on the nature of the relationship created in the first place. This is clearly recognized by the authorities cited to us. Take the case of *Birmingham and District Land Company v London and North Western Railway Company* [1886] 34 Ch D 261. There at p 274, Bowen LJ stated the position as follows:
>
> > But it is quite clear to my mind that a right to damages, which is all that the defendants have here if they are entitled to anything, is not a right to indemnity as such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. *It is an incident which the law attaches to the breach of a contract and is not a provision of the contract itself* (Emphasis added.)
>
> [11] Fry LJ in the same case at p 276 observed as follows:
>
> > Now in my view the word 'indemnity' in the rule which we have now to construe, means to express a direct right either at law or in equity to indemnity as such, and I think that this right has to be contrasted, and not to be confounded, with the right to damages which arises either from a breach of contract or from tort. A breach of contract gives rise, or may give rise, to a right to damages, but those damages are not the subject of the contract. They arise from the breach of the contract, and therefore they are in no sense the subject of the contract itself ... *It is the common law right which everybody has to damages for*

a wrong which has been done to him. Therefore the right to such damages is not a right to indemnity, although when you come to ascertain what the measure of damages is, it may be that indemnity will properly express that measure of damages. (Emphasis added.)

[65] The appellant can therefore invoke a claim based on indemnity. As the appellant's claim is a claim for indemnity, there is no cap of 5% of the subcontract sum.

THE COUNTERCLAIM

[66] As the respondent is liable to indemnify the appellant, it follows that the respondent's counterclaim is dismissed.

CONCLUSION

[67] For the above reasons, we are compelled to find that the plainly wrong test operates here, as per *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67. We therefore allow the appeal and set aside the decision of the HC. Effectively, this means the appellant's claim is allowed and the respondent's counterclaim is dismissed. We award costs of RM60,000 here and below to the appellant, subject to allocatur.

Appeal allowed and decision of the High Court set aside.

Reported by Ashok Kumar